mons but has so far failed to enter an appearance despite the undertaking given by his counsel that this would be done in due course. The applicant also had failed to follow the procedure relating to execution proceedings with the result that the sale of Lot 1682 to Liew Hee was set aside by the court. Parties in civil suits should observe the rules of procedure with meticulous care because a failure to do so may well result in irreparable set-backs for them and it is not often that a court will take it upon itself to free the parties from difficulties of their own making and put them on their feet again.

Costs of the proceedings are to be paid by the second and third respondents to the applicant and Liew Hee.

Order accordingly.

Solicitors: *Atma Singh Gill & Gill; Stanley Ponniah, Ng & Soo; Singh Bros.*

LUI AH YONG v. SUPERINTENDENT OF PRISONS, PENANG

[A.C.J. (Arulanandom J.) December 1, 1975]
[Penang — Originating Motion No. 22 of 1975]

Habeas Corpus — Application for — Illegal immigrant detained for 9 years, pending completion of arrangements for his removal — Citizenship of applicant in questional state — Whether detention could become illegal — Purpose of s. 324(1) of Immigration Ordinance considered — Immigration Ordinance 1959, s. 6(1), 34(1), 52(2) & 56.

Immigration — Illegal immigrant detained for 9 years — Whether detention could become illegal — Purpose behind s. 4(1) of Ordinance — Immigration Ordinance 1959, ss. 4(1), 6(1), 52(2) & 56.

About May 22, 1967, the applicant was arrested and detained by the police for illegal entry into the Federation from China. On August 24, 1967, he was charged in court for an offence under section 6(1) of the Immigration Ordinance 12/59 for entering the country illegally and for using a forged blue identity card. He pleaded guilty to both charges and was sentenced to two month's imprisonment for the first charge and three month's imprisonment for the second charge.

On November 25, 1967, the Controller of Immigration issued an Order of Removal under section 56(2) of the Immigration Ordinance. Section 56(2) reads, *inter alia*, as follows, "Any person unlawfully entering... the Federation... shall... be liable to be removed from the Federation by order of the Controller." An Order of Detention was also issued under section 34(1) of the Immigration Ordinance which reads as follows, "Where any person is ordered to be removed from the Federation under the provisions of this Ordinance, it shall be lawful for the Controller to order such person to be detained in custody for such period as may be necessary for the purpose of making arrangements for his removal...."

Since then the applicant had been in custody for almost 9 years. Counsel for the appellant submitted that section 34(1) of the Immigration Ordinance was not intended for the purpose of detaining a person indefinitely and the inordinate length of detention made the detention illegal. The question raised was whether a detention which at its inception was legal could become illegal as a result of passage of time or for other reasons.

Held, allowing the application: (1) the powers of detention under section 34(1) are clearly and unambiguously limited to detention for the purposes of removal to one of two places, i.e. the place of embarkation or country of citizenship and therefore the moment the detaining authorities have failed or found themselves in a position where the object of detention cannot be fulfilled, the further detention becomes unlawful;

(2) the intention of the legislature in enacting section 34(1) of the Immigration Ordinance was certainly not to justify detention for life or for an interminable period. It is a rule of construction of statutes which have penal effects that they should be construed strictly and in favour of the liberty of the subject.

[**Editorial Note:** See now *Andrew s/o Thamboosamy* v. *Sup. of Pudu Prisons* [1976] 2 M.L.J. 156 F.C.].

Cases referred to:-

(1) *Ex parte Johannes Choeldi & Ors.* [1960] M.L.J. 184.
(2) *Chye Chong & Ors.* v. *Public Prosecutor* [1975] 1 M.L.J. 215.
(3) *Musa bin Salleh* v. *Public Prosecutor* [1973] 1 M.L.J. 167.

ORIGINATING MOTION.

Darshan Singh for the applicant.

Haji Abdullah bin Ngah (Senior Federal Counsel) for the respondent.

Arulanandom J.: "Something is rotten in the State of Denmark." These words were uttered by Marcellus in Shakespeare's Hamlet after the ghost of Hamlet's father appears to Hamlet and beckons Hamlet to follow it, and Hamlet follows. Marcellus uses these words not so much in condemnation but more in frustration and bewilderment.

In the case before me the applicant Lui Ah Yong seeks a writ of *Habeas Corpus* for his immediate release from the Penang Prison. The undisputed facts before this court are as follows:

About May 22, 1967 the applicant was arrested and detained by the police for illegal entry into the Federation from China. On the 24th of August 1967 he was charged in the Magistrate's Court Sitiawan for an offence under section 6(1) of the Immigration Ordinance 12/59 — namely for entering the country illegally. He pleaded guilty to the charge and was sentenced to two months' imprisonment. On the same day he was also charged with using a forged blue identity card. He pleaded guilty to the charge also and was sentenced to three months' imprisonment.

On the 25th of November 1967 the Controller of Immigration issued an Order of Removal under section 56(2) of the Immigration Ordinance.

Section 56(2) of the Immigration Ordinance reads as follows:

"Any person unlawfully entering or re-entering or attempting unlawfully to enter or re-enter the Federation or unlawfully remaining in the Federation shall whether or not any proceedings are taken against him in respect of such offences be liable to be removed from the Federation by order of the Controller."

On the same day the Controller also issued an Order of Detention under the powers vested in him under section 34(1) of the Immigration Ordinance which reads as follows:

"34. (1) Where any person is ordered to be removed from the Federation under the provisions of this Ordinance, it shall be lawful for the Controller to order such person to be detained in custody for such period as may be necessary for the purpose of making arrangements for his removal:

Provided that any person detained under this subsection who appeals under the provisions of subsection (2) of section 33 against the order of removal may, in the discretion of the Controller, be released, pending the determination of his

appeal, on such conditions as to furnishing security or otherwise as the Controller may deem fit."

(Section 33 has no application to this case as the Order of Removal was made under section 56).

Since that date the applicant has been in custody for a period which now nearly amounts to about nine years.

There are several grounds advanced by the applicant in order to establish that his detention was illegal, *viz.* that he had been arrested and detained without trial and that he did not know why he was detained but during the course of argument and as a result of evidence being adduced, Counsel for the applicant conceded that the applicant had been tried in court for the two offences mentioned before and that his detention was as a result of the Order of Removal made under section 56(2) of the Immigration Ordinance.

But the most serious argument advanced by Counsel was that section 34(1) of the Immigration Ordinance was not intended for the purpose of detaining a person indefinitely and the inordinate length of detention made the detention illegal.

Referring to the first limb of his argument one must concede that by no stretch of the imagination could it be held that the powers of detention given in section 34(1) of the Ordinance were intended to be or even, contemplated as powers to detain a person indefinitely in prison. If it were so it would be totally unjust and oppressive and would go far beyond the severest provisions for detention contained in our penal laws which provide for definite periods of imprisonment or at least for regular reviews of the case where detention is indefinite. And in the case of sentences of imprisonment even a person sentenced to life imprisonment under the Penal Code usually serves only about thirteen years.

The second limb of the argument merits greater consideration, i.e. whether a detention which at its inception was legal could become illegal as a result of passage of time or for other reasons. The answer to this question will necessarily determine the result of this application.

The application is for a writ of *habeas corpus*. *Wharton's* Law Lexicon defines *habeas corpus* as follows: "This, the most celebrated prerogative writ in the English Law, is a remedy for a person deprived of his liberty. It is addressed to him who detains another in custody, and commands him to produce the body, with the day and cause of his caption and detention and to do, submit to, and receive whatever the judge or court shall consider in that behalf."

Learned Senior Federal Counsel has submitted to me that if the Order of Removal and the Order of Detention were lawful and valid, no court should interfere and a writ of *habeas corpus* seeking an order nisi and an order absolute should not be entertained.

The only case cited to me in respect of an Order of Removal and Order of Detention under section 34(1) of the Immigration Ordinance was the case of *Ex parte Johannes Choeldi and Ors.*[1] where Rigby J. released the applicants on the ground that the application in matters which concerned their personal liberty were entitled to avail themselves of any technical defects which may invalidate the order which deprived them of that liberty.

In the instant case from the admitted facts the applicant was convicted under section 6(1) of the Immigration Ordinance on his own plea of guilt of entering the country unlawfully. In that event the Order of Removal under section 56(2) of the Immigration Ordinance was a lawful and valid order and there are no technical defects in the order — in fact it follows the standard form used in all orders.

On the strength of the Order of Removal, the Order of Detention was issued. In view of what I shall say later, it is necessary to consider the terms of the whole order. It reads as follows:

"To:

LUI AH YONG a/k LUI KOK (1929)

WHEREAS an order has been made for your removal from the Federation under section 56(2) of the Immigration Ordinance, 1959.

AND WHEREAS your detention is considered necessary until arrangements can be made for your return to your place of embarkation or country of citizenship.

NOW KNOW YOU that, I, LIM HOCK CHUAN, Controller of Immigration, States of Malaya, by virtue of the powers vested in me under sub-section (1) of section 34 of the said Ordinance, do hereby order that you be detained in Penang Prison.

Dated at KUALA LUMPUR this 25th day of November, 1967.

Sgd. LIM HOCK CHUAN
CONTROLLER OF IMMIGRATION,
STATES OF MALAYA."

Now section 34(1) empowers the Director-General (Controller in the earlier Ordinance) to order a person to be detained in custody for such period as may be necessary for the purpose of making arrangements for the person's removal from the Federation.

Hence it is not an order of detention per se, i.e. it is not an order of detention for the sake of detention for the purpose of punishment, security or national interest. The detention is not an end in itself but purely a means to an end, i.e. to detain the person for the purpose of removing him from the Federation. Hence as a consequential order to the Order of Removal, it is a perfectly valid order and cannot be considered unlawful. But that was in 1967.

Today in 1975 the court is asked to decide on whether the continued detention of the applicant is lawful. Eight years have slipped by while the applicant has been deprived of his liberty and has languished in prison — not for any offence he has committed because he has already served two months' imprisonment for entering the country illegally but he has been detained for administrative expediency.

The Deputy Director of Immigration Encik Mohd. Noor b. Ahmad in his affidavit in reply to the application has this to say in justification of the continued detention of the applicant:

"Several arrangements have been made to remove the Applicant to a country outside Malaysia but are all in vain as no country so far contacted was prepared to aceept the Applicant. Arrangements to remove the Applicant is still in progress."

This, to say the least, discloses a most scandalous state of affairs and does not bring any credit to the Administration. A man has been incarcerated for the ostensible purpose of deportation and nine years later the court is told, and even that, as a result of a writ of *habeas corpus* being filed that arrangements to remove him are still in progress. The word progress must surely be used euphemistically. Progress is defined in the Oxford Dictionary as advance, continuous improvement. And here after a passage of nine years during which the authorities have not succeeded in putting a man on a ship, or a plane or even a bullock cart to take him away from the country, it is said that arrangements are in progress. During this period of time space has been conquered, kingdoms have been lost and won and man has even visited the moon and come back. And yet this unfortunate human being unknown to the rest of the world has been deprived of his liberty and held in a prison, while I quote "Arrangements are still in progress to remove him from the Federation." It is true that the subject matter is a human being and unlike smuggled goods or prohibited imports, he can't be destroyed by burning or dumped into the sea. But the least one could have expected in a just society would have been for the authorities, when they were faced with problems of deportation, to consider alternate ways of keeping track of him so that when the Order of Removal was ready to be executed, he could be removed without him having to languish in prison for nine years or even longer.

Now to come back to the law.

The order of detention states in para 2 that the detention of the applicant was considered necessary until arrangements could be made for his return to the applicant's place of embarkation or country of citizenship.

It is undisputed that the applicant's place of embarkation was China and from the Bar, the learned Senior Federal Counsel admitted that China had refused to receive the applicant.

The citizenship of the applicant is not established. It is conceded by the Deputy Assistant Director of Immigration in his affidavit that the applicant was born in this country and it is also conceded by Senior Federal Counsel that the applicant was in possession of a red Identity Card No. PK324481 issued at Sitiawan on December 13, 1948. With the citizenship of the applicant in a questionable state it is impossible to determine which country of his citizenship the authorities have been trying to deport the applicant to. From the evidence before the court it would appear that at the present time the applicant is not a citizen of any country especially since China seems to have abandoned the doctrine of *jus saguine* which in earlier days made a Chinese a citizen of China irrespective of the place of birth.

In view of this it is quite obvious that the authorities have exhausted all avenues and are unable to remove the applicant to his place of embarkation or his country of citizenship.

The powers of detention under section 34(1) are clearly and unambiguously limited to detention for the purposes of removal to one of two places, i.e. the place of embarkation or country of citizenship and therefore the moment the detaining authorities have failed or found themselves in a position where the object of detention cannot be fulfilled, then it cannot be argued that further detention remains lawful. The purpose of the detention having been frustrated, continued detention *a fortiori* becomes unlawful.

The intention of the Legislature in enacting section 34(1) of the Immigration Ordinance was certainly not to justify detention for life or for an interminable period. It is a rule of construction of statutes which have penal effects that they should be construed strictly and in favour of the liberty of the subject. Any form of detention does violence to Article 5 of the Constitution and hence powers given by law must be construed not only strictly but where occasion merits should lean in favour of and with mercy to the subject. See *Chye Chong & Ors.* v. *Public Prosecutor*[2] and *Musa bin Salleh* v. *Public Prosecutor.*[3] I do not need any authority or need to cite any precedent when I enunciate that the provisions of any statute, be they penal or otherwise are not intended to be cruel, oppressive or inhuman. In considering the provisions by analogy with the Banishment Act, it is to be noted that section 7(1) of the Banishment Act empowers the Minister to suspend the order and release the banishee on his entering into a bond with or without surety and subject to any conditions as may be specified in the order. Similarly under section 8 of the Act when an expulsion order is made the Minister may impose such conditions as he may think fit as to residence, occupation or conduct to police supervision, etc., which shall be observed by the person affected by the order while he remains in Malaysia. From the tenor of these provisions it is abundantly clear that section 34(1) of the Ordinance only contemplated removal of the person affected from Malaysia within a reasonable time required for putting into effect the removal order and not for detaining a person indefinitely and arbitrarily.

In this case the applicant has a wife who is a Malaysian citizen and resident in Sitiawan with his four children. The object of the Order of Removal cannot be frustrated by his being released from detention to the care of his wife and being put on a bond with a surety to attend on the Director-General of Immigration when he has completed, I repeat, completed all arrangements and is ready to put applicant on board a plane or a ship to be taken to a certain destination where he will be received. I say this because it would be just as cruel and inhuman to put him on a carrier which takes him from Malaysia and to another country which will not receive him and thus only substitute a mobile place of detention instead of the present localised one.

I therefore order that the applicant be forthwith released from detention. I further order that the applicant enter into a bond in the sum of $1,000/- with one surety, the condition of the bond being that he would reside in Sitiawan with his wife Loy Lang Chor at 143 Simpang Dua New Village, Sitiawan, Perak and surrender himself to the Director-General of Immigration when called up to do so for the purpose of being put on a ship or plane to be taken to a country prepared to receive him.

Order accordingly.

Solicitors: *Darshan Singh Khera.*